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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 75

MADELINE C. SCHROEDER,

Appellant,

—v.—

THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

LEO A. LARKIN
Corporation Counsel
of the City of New York
Attorney for Appellee
41 John Street
Kingston, N. Y.

SEYMOUR B. QUEL
THEODORE R. LEE
WILLIAM A. KAERCHER
of Counsel

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APPELLEE'S BRIEF

Opinions Below

Reported below: 14 A D 2d 183, 217 N.Y.S. 2d 975; 10 N Y 2d 522, 180 N.E. 2d 568.

The Statute Involved

Section K41-8.0 of Title K of Chapter 41 of the Administrative Code of the City of New York (hereinafter referred to as the Water Supply Act) is printed at pages 2-3 of the appellant's brief. It provides that notice of the application for the appointment of Commissioners of Appraisal in New York City water supply proceedings shall be published in the City Record, and in two public news-

papers published in the City of New York and in two public newspapers published in each county in which the real estate affected may be located. Such notice must be published once in each week for six weeks immediately previous to the presentation of the petition. And in addition the Corporation Counsel must cause copies thereof to be posted for the same period of time in at least 20 conspicuous places in the vicinity of the real estate to be taken or affected.

This section was derived from L. 1905, ch. 724, §8 which in turn was derived from L. 1883, ch. 490, §7. Notice by publication and posting has been the prescribed form of notice in New York City water supply proceedings since 1883.

The pertinent portion of §K41-18.0 is printed at pages 43-44 of appellant's brief. Section K41-18.0(a) provides that claims for direct damages due to the acquisition of a fee or an easement, as in the present case, must be presented within three years after the vesting of title and §K41-11.0 provides that title vests upon the filing of the oaths of office of the Commissioners of Appraisal.

In this case title vested on June 9, 1952 (R. 8, 18). Actual diversion commenced on June 1, 1953 (R. 9, 18). The appellant never did present a claim for damages to her property and did not serve the summons and complaint in this action until January 12, 1960 (R. 1), almost 7 years after the diversion started and almost 8 years after the defendant acquired the right to divert. It is therefore apparent that if the Water Supply Act is constitutional, as we contend that it is, the appellant is now barred from asserting any claim for alleged damages to her property and from maintaining this suit for an injunction.

Question Presented

Does notice by publication and posting for six weeks, pursuant to Section K41-8.0 of the Water Supply Act, of an application for the right to divert water from riparian property of a nonresident owner, whose address was not known to the City, constitute sufficient notice under the Due Process Clause of the Federal Constitution?

Statement of the Case

(1)

The preliminary steps taken in the Neversink-Riparian Section No. 4 proceeding, pursuant to which the appellee acquired the right to divert water from the appellant's property, are outlined in the appellee's answer (R. 12-20) and the petition in such proceeding attached to the answer as Exhibit D (R. 26-33).

On July 27, 1927, the Board of Water Supply reported to the Board of Estimate and Apportionment recommending a plan for the development of an additional supply of water from tributaries of the Delaware River (R. 27).

A general map of the sources of such additional supply, dated June 21, 1927, accompanied such report (R. 27).

After due and reasonable notice the Board of Estimate and Apportionment held a public hearing concerning such map and plan and thereafter, by resolution dated January 12, 19[illegible], approved and adopted such map as the "final map" of the Delaware project (R. 27-28).

Thereafter such final map was executed and certified in quadruplicate and filed as required by law (R. 28).

On May 25, 1929, the Water Power and Control Commission of the State of New York approved such map and plan (R. 28).

Subsequently, after due notice and public hearings such map and plan were modified, in certain respects not material here, in accordance with a modification map dated July 21, 1938 and such modified map was duly approved by the Board of Estimate of the City of New York and by the Water Power and Control Commission (R. 28-29).

Thereafter the Board of Water Supply prepared six similar maps entitled:

> "Neversink Riparian Section No. 4 Board of Water Supply of the City of New York, Map of Real Estate Situated Along the Neversink River from the Vicinity of Cuddebackville to the Vicinity of Huguenot in the Town of Deerpark, County of Orange, State of New York."

Such maps were duly approved and adopted by the Board of Estimate and a duplicate original thereof was filed in the Orange County Clerk's office on December 5, 1951 (R. 30). A small scale copy of the map was submitted with the answer as Exhibit A (R. 16).

Upon these maps the various parcels, including the appellant's property, which the petitioner therein (the appellee herein) sought to appropriate were laid out and separately numbered. The property division lines of such parcels were delineated thereon.

The cover and index sheets of the map indicate that the name of the reputed claimant or owner of Parcel number 424 was Madeline Schroeder, the appellant herein. Sheet 10 of the map shows the location of Parcel number 424 near top of page.

The Water Supply Act, like other condemnation statutes in general, requires the part taken to be shown. Property not taken need not be shown. For example, if a condemning authority acquires one acre from a ten acre tract, the one acre taken must be shown but the nine acre residue need not be shown.

In the present instance a diversionary easement is involved. The interest acquired lies entirely between the banks of the river and the division lines between such parcels are delineated on the map. The upland boundaries of property not taken, i.e., of the residues, are not shown. Such boundaries are not required to be shown.

The Water Supply Act does not require the names of the owners to be stated on the maps, in the petition, or in the notice of application for appointment of Commissioners of Appraisal (§§K41-3.0, K41-5.0, K41-7.0 and K41-8.0). However, as we pointed out previously, the taking map lists the name of the reputed claimant or owner of Parcel 424 as Madeline Schroeder, the appellant herein.

Section K41-5.0 expressly authorizes the maps to be made and filed in sections and it provides that such sections "shall be so determined that one commission shall not be appointed for a section covering more property than can reasonably be passed upon and awards made by such commission within the limits of a year from the time of the filing of the oaths . . ." The Neversink proceedings were divided into five sections, which contained an average of 84 parcels each, a number which a commission could reasonably be expected to dispose of within one year. Accordingly the division of the proceedings into sections was not arbitrary as claimed in the appellant's brief, p. 36, but was in accordance with the statute.

The Corporation Counsel, pursuant to §K41-8.0, prepared a notice of application for appointment of Commissioners of Appraisal. Such notice stated the object of the application, the time and place of the application, described the real estate in which it sought to acquire a diversionary interest, with an enumeration of the parcel numbers and a reference to the taking map and the date it was filed in the Orange County Clerk's office (R. 21-22).

The title in the Neversink Riparian proceeding identified the proceeding and indicated the nature thereof. The title not only revealed that the proceeding was pending in the Ninth Judicial District, which was the proper district, but it also indicated that the properties affected were located in Orange County (R. 21, 23, 26) and the notice indicated more specifically that such properties were situated along the Neversink River from the vicinity of Cuddebackville to the vicinity of Huguenot (R. 22). The map was filed in accordance with §K41-6.0 and the notice, in accordance with §K41-8.0, recited that the map was filed in the office of the County Clerk of Orange County on December 5, 1951. There is therefore no basis whatever for the charge contained in the *amicus curiae* brief of Messrs. Goldstein and Goldstein (p. 5), that the title of the proceeding was defective or that the map and papers in the proceeding were not properly filed.

The notice was published once in each week for at least six weeks immediately previous to the presentation of the petition and was posted for the same period of time in at least twenty conspicuous places in the vicinity of the real estate in which the petitioner sought to acquire an interest (R. 8, 16-17, 23-26, 36).

Section K41-8.0 provides that the handbills shall be posted "on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected." The handbills were

therefore posted along the river, in the vicinity of the real estate affected, in accordance with the provisions of the statute. The notice was both published and posted in accordance with the provisions of the Water Supply Act (R. 16, 21-26, 36).

The petition in such proceeding sought the right and easement in perpetuity to divert certain waters from and release certain waters into the Neversink River (R. 31). It was signed and verified by the President of the Board of Water Supply (R. 33-34) and it set forth the action theretofore taken by the Board of Water Supply and the Board of Estimate, the filing of the maps, and prayed for the appointment of Commissioners of Appraisal (R. 27-30, 33). The petition contained a general description of the real estate in which an interest, right or easement was sought to be acquired as well as a more particular reference to the parcel numbers as given on the taking map (R. 32). All of this was in accordance with the provisions of §K41-7.0.

Sections K41-7.0, K41-8.0 and K41-9.0 relate to applications for the appointment of Commissioners of Appraisal. Sections K41-7.0 and K41-9.0 provide for the presentation of the petition upon the application at the time and place mentioned in the notice, at which time the petition in Neversink Section No. 4 was presented as prescribed by the statute. The statute does not require the petition to be presented before the publication and posting of the notice. The map was, however, filed previously, as appears from the notice (R. 22). In the circumstances the notice, without the petition, was as effective as a summons served without a complaint.

The order appointing Commissioners of Appraisal therein was entered in the Orange County Clerk's office on May 29, 1952 (R. 17).

The Commissioners of Appraisal subscribed their oaths of office on June 2, 1952 and the oaths were filed in the Orange County Clerk's office on June 6, 1952, and in the New York County Clerk's office on June 9, 1952 (R. 8).

The City of New York thereupon became vested with the right to divert and release water as specified in the petition and order and as shown on the taking map, pursuant to §K41-11.0 of the Water Supply Act.

Actual diversion commenced on or about June 1, 1953 (R. 9).

Thereafter Commissioners were appointed to succeed the original Neversink Section No. 4 Commissioners and ultimately Section No. 4 was consolidated with Sections 3 and 5 and Commissioners were appointed for Consolidated Sections Nos. 3, 4 and 5.

It is therefore apparent that the notices, the "final maps", the six similar maps and the petition, were all in accordance with the provisions of the Statute.

Although there is a presumption that a municipality has complied with all statutory conditions (See *Matter of Mayor (Vanderbilt Avenue)*, 95 App. Div. 533, 538-539, 88 N.Y.S. 769, 772 (1st Dept., 1904) and *Bernstein v. City of Mount Vernon*, 109 App. Div. 899, 96 N.Y.S. 458 (2nd Dept., 1905)), there is no necessity for the appellee to rely upon such presumption in this case because we have demonstrated compliance and the appellant in her pleadings and brief raised no issue with respect to such compliance (See appellant's brief, pp. 5, 8, 10). Furthermore, this Court is bound by the finding of the New York Court of Appeals that the procedure followed here complied with the statutory requirement. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, at p. 282 (1924).

(2)

The Neversink Dam and Reservoir were constructed on the Neversink River in accordance with the plans approved in the above mentioned proceeding.

The appellant, a resident of New Jersey (R. 8), is the owner of certain real estate in New York located on the Neversink River downstream from the dam and reservoir.

The City acquired the right to divert on June 9, 1952 (R. 8, 18) and actual diversion commenced on June 1, 1953 upon completion of the dam (R. 9, 18).

The appellant did not file a claim for damages in the riparian proceeding (R. 19), but in January 1960 (R. 12), six and one-half years after the diversion, and seven and one-half years after the acquisition of the right to divert, she commenced the present suit for an injunction restraining the City from diverting water from the Neversink River. The appellant alleged in her complaint that she did not customarily purchase New York newspapers; that she did not see any of the published notices; that she did not observe any of the posters; and that she did not learn that the City had "acquired any portion of her property" or that she "had a right to a claim" prior to her retention of counsel in September, 1959 (R. 9). Significantly, however, the appellant did not allege that she was unaware of the diversion. This is tantamount to an admission that she knew of the diversion although she was unaware that the diversion constituted a taking or that she had a right to file a claim until she consulted an attorney.

The appellee by its answer interposed the defense of the three year statute of limitations contained in Section K41-18.0 of the Water Supply Act. After the appellant served a reply (R. 37-38) in which she in effect admitted

compliance by the City with the various steps prescribed by the Water Supply Act but denied that the City had acquired the right to divert water from the river and that her action was barred (See appellant's brief, p. 10), the City moved for judgment on the pleadings which motion was granted and the complaint was dismissed. This action of the lower court was sustained on appeal to the Appellate Division and to the New York Court of Appeals.

Summary of Argument

Since the notice given here was adequate and the appellant failed to file a claim for damages within the time prescribed by statute she is barred from maintaining this suit for an injunction and from recovering damages.

ARGUMENT

POINT I

In view of the fact that the appellee acquired the right to divert water flowing past the appellant's property pursuant to a statute which provided for adequate notice and the fact that the appellant did not file a claim within the time prescribed by such statute the appellant is barred from maintaining this suit for an injunction and from recovering damages.

The appellant did not present her claim in the water supply proceeding within three years of the filing of the oaths of office of the Commissioners of Appraisal on June 9, 1952, or within three years from the actual diversion on June 2, 1953. Therefore her claim is barred by the Statute of Limitations provided for in §K41-18.0 and by laches and she cannot maintain this suit for an injunction.

A. Where, as here, the right acquired was one to divert water flowing past the property of a nonresident owner whose address was not known and the effect of the diversion was visible, notice by publication and posting for six weeks was sufficient under the Due Process Clause of the Federal Constitution.

Due process does not require personal service in every type of proceeding, especially in the case of nonresidents. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In *Huling* v. *Kaw Valley Railway and Improvement Co.*, 130 U.S. 559 (1889), this Court held that as against a nonresident owner notice of the condemnation proceedings by thirty days publication did not violate due process even though the owner had no actual notice.

For another condemnation case in which this Court held that notice by publication for two successive weeks in any newspaper published in the county where the lands were located was sufficient service upon a nonresident; see *Wick* v. *Chelan Electric Co.*, 280 U.S. 108 (1929):

Even when a resident is involved personal service is not always required. An *in rem* foreclosure of property for arrears of water charges was upheld in *Nelson* v. *City of New York*, 352 U.S. 103 (1956), where notice was published, posted and mailed to the owner in accordance with the provisions of the statute, even though the owner never received the mailed notice which was concealed by his bookkeeper. This Court recognized that publication, where reinforced by other acts such as service by posting and mailing, was sufficient and that personal notice was not indispensable to due process.

The test of the constitutionality of a notice is whether it is reasonably calculated, under all of the circumstances,

to apprise interested parties of the pendency of the proceeding. *Mullane* v. *Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950), cited in appellant's brief (pp. 13, 15, 19), *Walker* v. *Hutchinson*, 352 U.S. 112, 115 (1956) (appellant's brief, pp. 13, 19).

The *Mullane* case, *supra*, held that notice by publication alone for the settlement of an account in a common trust fund pursuant to the New York Banking Law, was inadequate as to beneficiaries whose names and addresses were *known* to the trustee. Such notice was held to be adequate as to beneficiaries whose addresses were *unknown* and did not come to the attention of the trustee in due course of business, and the objections to such notice on behalf of the latter beneficiaries, as well as those whose interests were future or conjectural, were expressly overruled even though the interests or addresses could have been discovered upon investigation (339 U.S. 317-318).

Although the complaint in the present case does not allege that the appellee knew the appellant's address, the appellant intimates that the appellee knew the appellant's address (appellant's brief, p. 3) or that the address was "at hand" (appellant's brief, p. 12). The fact is that although the appellee, of course, knew the location of the subject property it did not know the appellant's address. Furthermore, the appellee was under no obligation to attempt to ascertain the address of the appellant because the statute did not require either personal service or service by mail.

This Court in the *Mullane* case recognized that notice by publication would be sufficient if reinforced by other acts when it said (p. 316):

> "It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey

> a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification."

In the present case the notice was posted as well as published and the diversion of water from the river was the equivalent of an entry upon the plaintiff's real estate. Therefore, the notice given in the present case complied with the rule set forth in the *Mullane* case.

New York v. *New York, N. H. & H. R. Co.*, 344 U.S. 293 (1953) (appellant's brief, pp. 13, 19, 20), involved a railroad reorganization proceeding where the City had a lien for taxes upon specific parcels of land owned by the railroad. The Bankruptcy Act provided that the judge should require "reasonable notice" of the period in which claims should be filed "by publication or otherwise" and should require proper persons to file a list of all known creditors, the amount and character of their claims and their last known post office addresses. The District Court issued an order directing creditors to file their claims by a prescribed date, after which unfiled claims would be barred. The railroad was required to mail copies of the order to the mortgagees and to all creditors who had already appeared in the proceeding. The notice given to other creditors, including the City, consisted of two once-a-week publications of the order in five daily newspapers, only one of which, the Wall Street Journal, was published in New York. The City did not receive a copy of the bar order and did not

file its lien claim within the period designated in the order. Although the railroad and the bankruptcy trustees knew of the City's lien the City was not listed as a creditor and although notice was mailed to the railroad's mortgagees, whose lien was subordinate to that of the City, notice was not mailed to the City. If the City had been listed as a creditor in accordance with the statute, notice probably would have been mailed to the City too. It appeared that the City knew that reorganization proceedings were pending in court. However, the time limitation for filing claims was not prescribed by the statute, as it is in the present case, but by the bar order. Under these circumstances, this Court held that such publication was ineffective to bar the City's claim and that the City had a right to assume that the statutory "reasonable notice" of the bar order, which prescribed the date by which claims had to be filed, would be given. This Court recognized, however (p. 296), that notice by publication may be justified when the names, interests and addresses of persons are unknown. As previously indicated, the address of the appellant in the present case was not known to the City.

Walker v. *Hutchinson*, 352 U.S. 112 (1956), cited in appellant's brief (p. 19), involved the constitutionality of a Kansas condemnation statute which required a city to give landowners ten days notice of the time and place of the proceeding and further provided that such notice could be given either "in writing * * * or by one publication in the official city paper * * *." The petitioner's name was not only known to the city but was on the official records. Nevertheless, he was not notified of the proceeding, the condemning authority relying entirely upon a single publication in a newspaper. This Court held that, under the circumstances of that case, the notice by publication fell short of the requirements of due process. The opinion (p. 116) cited the *Huling* case, *supra*, and referred to the fact that the

plaintiff in that case (like the appellant here) was a non-resident as a ground for distinguishing the *Huling* case from the *Walker* case where the plaintiff was a resident. In *Walker* there was nothing to reinforce the single publication.

In the instant case the notice was published in the City Record, and in two public newspapers published in the City of New York and in two public newspapers published in each county in which the real estate affected was located. It was published once in each week for seven weeks immediately previous to the presentation of the petition. And in addition the copies thereof were posted for the same period of time in 22 conspicuous places in the vicinity of the real estate taken or affected (Def. Exs. B and C; R. 21-26).

The notices which were posted in the riparian proceeding here were printed with permanent ink on canvas approximately 24¼ inches long and 18 inches wide and firmly affixed to the places to which they were attached. One of the notices was posted on a pole on the westerly side of the Neversink River at the corner of Route 209 and the road to a railroad station (Def. Ex. C; R. 17, 24, 26). As appears from sheet No. 10 of the condemnation map (Def. Ex. A; R. 16) the road to the railroad station from Route 209 was a short dead-end road, over approximately 1200 feet of which it was necessary for the appellant to pass in order to reach her property (Parcel 424). It was therefore almost as though the notice was posted on the appellant's own driveway.

Contrary to the appellant's contention the appellee was very conscientious about the publication and posting of the notices. The notices were published seven times instead

of the six times prescribed by statute and twenty-two handbills were posted instead of the twenty prescribed by statute (Def. Ex. C; R. 17, 23). These handbills were posted in the most conspicuous places near the river (Def. Ex. C; R. 17, 23-25). Thus the posting was of such a character as to be reasonably calculated to give these claimants notice.

The complaint in this action alleges great, severe and irreparable damages and that the diversion destroyed the availability of the river for bathing, swimming, fishing and boating (R. 9, 11). The appellant's brief (p. 28) asserts that the diversion amounted to approximately fifty per cent of the flow. These allegations, particularly those regarding the percentage of diversion and the effect of the diversion on boating, charge the appellant with knowledge of the diversion and exclude any other hypothesis except that the effect of the diversion on the Neversink was patently visible. This was not only a proper inference to draw from the appellant's allegations but it was a geographical fact of which the Appellate Division and the Court of Appeals could properly take judicial notice (31 C.J.S., *Evidence* §33a). Furthermore, a court may assume judicial knowledge of facts which it has learned through former litigation (31 C.J.S., *Evidence* §10). The effect of the diversion on the Neversink River was involved in several cases which reached the Appellate Division before or at the same time as the case at bar including: *Matter of Huie (Lipman)*, 2 A D 2d 786(4), 154 N.Y.S. 2d 242 (1956), *Matter of Huie (Berger)*, 2 Misc 2d 38, 40, 45, 154 N.Y.S. 2d 824, affd. 2 A D 2d 631 (64), 153 N.Y.S. 2d 610 (1956), *Matter of Huie (Klass)*, 11 A D 2d 837(27), 202 N.Y.S. 2d 954 (1960), and *Matter of Huie (Fire Commissioners of Woodbourne Fire District)*, 14 A D 2d 627(32), 218 N.Y.S. 2d 791 (1961). It was, therefore, quite proper for the Appellate Division, in the present case, to take into consideration the patently visible effect of the diversion on the river.

The *Walker* opinion stated, at p. 115, that "notice required will vary with circumstances and conditions."

A circumstance bearing on the reasonableness of the notice given here was the size and character of the project. The Neversink Dam is approximately 2800 feet in length (Def. Ex. D; R. 17, 29). The reservoir is approximately 5 miles in length with a maximum width of about 1.5 miles and an average width of about one-half mile and a shore line of approximately 18 miles (Def. Ex. D; R. 17, 30). The construction of such a reservoir involves the removal of hundreds of people from the reservoir area, the relocation of highways and utilities and the employment of hundreds of men, including many local men. The land is cleared of all building and improvements as well as trees and shrubs. Even the remains of the dead are removed from cemeteries in the area to be flooded for reinterment elsewhere. Such proceedings are of great local interest so they are accompanied by a great deal of publicity. Of necessity such proceedings come to the attention of everyone for miles around and particularly to the attention of the owners of properties which are likely to be affected.

The Neversink Reservoir is a part of the famed "Delaware Project" of the City of New York for an additional supply of water which was preceded by litigation and attendant publicity. In *New Jersey* v. *New York*, 283 U.S. 336, 805 (1931) the City of New York was, in effect, permitted to divert 440 million gallons of water daily from certain specified tributaries of the Delaware River, including the Neversink, upon the conditions therein mentioned. Later, the decree was amended in 347 U.S. 995 (1954) and as amended, subject to certain conditions, permits the City to divert 800 million gallons per day after completion of the Cannonsville Reservoir, which was not involved in the original suit. The publicity which accompanied this litigation

tended to bring to the attention of the public and especially to the attention of the owners of properties affected the fact that water would be and was being diverted from the Neversink River.

The construction of the reservoir, the attendant litigation and publicity and the patently visible diversion of water from the river are circumstances and conditions which, under the doctrine of the *Mullane* and *Walker* cases, may properly be taken into consideration in determining that the notice given here was reasonably calculated to apprise interested parties of the proceeding and afford them an opportunity to present their claims.

We submit that under the circumstances the notice required by the Water Supply Act falls well within the constitutional standards referred to in the cases cited and that, accordingly, any attack on the constitutionality of the notice provision of the Water Supply Act must fail. See Annotation in 1 L. ed. 2d 1635 *et seq.* on "Due process requirements as to notice in condemnation proceedings—Supreme Court cases." Accordingly, under the facts and circumstances surrounding the present case the defense of the Statute of Limitations was properly sustained.

As to the alleged failure of a number of owners to file claims, in a proceeding to acquire riparian rights, as distinguished from one to acquire properties in fee, it may be expected that some owners may not file claims, not because they are unaware of the diversion but because they may feel that their properties are not sufficiently affected to justify the filing of claims. As the index sheet of the taking map (Def. Ex. A; R. 16) indicates, fourteen of the parcels in Neversink Riparian Section No. 4, where the appellant's property is located, are mapped to "Unknown" owners. In view of the fact that title to the bed of a stream is frequently in doubt and that a riparian owner who can prove

title only to the bank of the stream usually proves the same elements of damages as could be proved if title to the river-bed parcels could be established, it is not surprising that claims may not have been filed covering a number of such parcels. Other parcels, mapped to known owners, were unimproved and some of the properties were occupied in such manner as to obtain little, if any, benefit from the river.

It also appeared that some of the owners knew of the proceedings but either they or their attorney neglected to file a claim until after the time for filing claims had expired. For example, in *Matter of Huie (Cudney)*, 9 A D 2d 1009 (44), 195 N.Y.S. 2d 30 (3d Dept., 1959), it was apparent that the claimant knew of the proceeding because he filed a timely claim with respect to one parcel but failed to file a claim covering another property in which he was interested until after time for filing claims had lapsed; and in *Matter of Huie (Richle)*, 15 A D 2d 931 (13), 226 N.Y.S. 2d 295 (2d Dept., 1962), the owner retained an attorney in plenty of time to file a claim; the attorney wrote the Corporation Counsel inquiring about the procedure to be followed, without mentioning the parcel number or the name of his client; and the Corporation Counsel mailed the attorney a form of claim to be used and a copy of the Water Supply Act, but the attorney failed to file a claim within the statutory period. In any event the failure of owners of other parcels to file claims for damages to their properties does not excuse the appellant for her failure to file a claim within the statutory period.

Wüchter v. *Pizzutti*, 276 U. S. 13 (1928), cited in appellant's brief pp. 32, 33, 35, 36, held that actual notice of service of proposed execution in Pennsylvania did not validate a judgment rendered in accordance with a non-resident motorist statute of New Jersey which provided for service on the Secretary of State but did not require

the Secretary of State to mail the notice to the defendant. That case, which was decided in 1928 and in which Justices BRANDEIS, HOLMES and STONE dissented, is apparently inconsistent with the later holding of this Court in the *Mullane* case, *supra*. There notice by publication was held to be sufficient as to beneficiaries whose addresses were not known or whose interests were conjectural or future although it did not appear that they had actual notice and this Court indicated (339 U.S. at p. 318), that notice to the known beneficiaries would have been sufficient if the notice had been served personally or by ordinary mail. After citing the *Wuchter* case, the *Mullane* opinion stated (p. 319):

> "Of course personal service even without the jurisdiction of the issuing authority serves the end of actual and personal notice, whatever power of compulsion it might lack. However, no such service is required under the circumstances."

Also in the *Walker* case, *supra*, this Court said (352 U.S. at p. 116) that even a letter would have apprised the owner that his property was about to be taken and that he would have to appear if he wanted to be heard as to its value. Thus this Court implied that if the owner in that case had had actual notice, or even if a letter had been mailed to him the decision would have been different. The *Wuchter* case, unlike the present case, was not concerned with the tangible and visible.

The notice given in the present case clearly complies with the test previously laid down by this Court for the sufficiency of notice in cases of this kind.

B. Statutes which provide that claims for compensation in eminent domain proceedings must be presented timely or they are forever barred are valid under the Due Process Clause of the Fourteenth Amendment. The appellant's failure to present a claim within the time prescribed by the Water Supply Act bars her from maintaining this suit for an injunction and from recovering damages.

(1)

There is no basis for the appellant's criticism of the Court of Appeals for its alleged failure to distinguish between a notice of application to acquire the right to divert and a notice of hearing in regard to compensation (appellant's brief, pp. 23-25). The notice published and posted here was a notice of the application for the right to condemn and for the appointment of Commissioners of Appraisal. However, the Fourteenth Amendment does not require notice of the necessity and extent of the taking. In *Sears* v. *Akron*, 246 U.S. 242 (1918) this Court held that an Ohio statute authorizing a municipality to condemn property for purposes of water supply did not violate the Fourteenth Amendment because it afforded no opportunity to the owner to be heard as to the necessity and extent of the taking.

The only notice in eminent domain proceedings which the constitution requires is reasonable notice affording the owner an opportunity to be heard at some stage of the proceeding on the question of compensation. See *Bragg* v. *Weaver*, 251 U.S. 57 (1919); *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276 (1925); and Annotation in 1 L. ed. 2d on "Due process requirements as to notice in condemnation cases—Supreme Court cases" at pp. 1636-1637.

The notice by publication and posting and the notice afforded by actual diversion, both being sufficient for such purpose, this constitutional benefit, like many other consti-

tutional benefits, can be waived. The failure of an owner to apply for compensation within the period prescribed by statute may constitute a waiver of the right to compensation.

(2)

The highest New York Court has long held that claims for compensation for property taken by eminent domain must be filed timely or they may be barred. Notable among such cases are: *Rexford* v. *Knight*, 11 N.Y. 308 (1854); *Mark et al.* v. *The State*, 97 N. Y. 572 (1885); *Stewart* v. *State of New York*, 105 N.Y. 254, 11 N.E. 652 (1887); and *Benedict* v. *State of New York*, 120 N.Y. 228, 24 N.E. 314 (1890). In the *Benedict* case, which involved the appropriation of real property for canal purposes, the Court stated (p. 232):

> "The neglect to present the claim within one year after the construction of the dam was a waiver of all rights of damages against the state."

The wording of the Canal Act (Section 48 of the Revised Statutes, Article 3, Title 9, Part I) which was interpreted in the *Benedict* case is very similar to the wording of the Water Supply Act §K41-18.0 which was interpreted by the New York Court of Appeals in the case at bar.

(3)

In *Pierce* v. *Somerset Railway*, 171 U. S. 641 (1898), this Court ruled that the defense of estoppel on account of laches and acquiescence is not a Federal question and stated (p. 648):

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost

such right by his failure to act, or by his action, is not a Federal one."

In *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*, 142 U.S. 254 (1891) the essential facts, as far as pertinent here, were that pursuant to an act of the Wisconsin Legislature in 1848, the State of Wisconsin, between 1853 and 1855, caused a dam to be constructed on the Fox River to divert water into a canal around rapids in the river. The statute did not make adequate provision for the ascertainment and payment of compensation for properties taken. Later, in 1875 Congress passed an act to aid in the improvement of the Fox and Wisconsin Rivers which provided for the ascertainment of damages to the owners of properties flooded or injured by the improvements theretofore or thereafter constructed. In 1876, pursuant to that act, the United States built a dam on the Fox River forty feet downstream from the old dam, which, like the old dam, caused the flooding of property of the defendant Kaukauna Water Power Company. In 1888 Congress passed another act which made appropriation for the payment of flowage damages to approximately 125 claimants but provided that the United States should not be held liable for damages "unless the action or proceeding to ascertain and determine the amount . . . shall have been or shall be commenced . . . prior to the passage of this Act; and all claims and causes of action now existing upon which no proceeding has been already or shall be taken within the time last specified to enforce the same shall be forever barred." In this suit by the Canal Company, which acquired its rights from the State of Wisconsin, for an injunction restraining the Power Company and its tenants from interfering with the pond created by the dam the Power Company contended, among other things, that the Canal Company had not acquired the right to flood the land of the Power Company because neither

the Power Company nor its predecessor in title had ever been paid for the land overflowed. In affirming a decree of the Supreme Court of Wisconsin granting an injunction this Court indicated that although the defendants, as the owner of and persons interested in land overflowed, had been entitled to compensation, they had not been deprived of their property without due process of law and, referring to the defendants, said (p. 280):

> "Congress was not obliged to keep the Act of 1875 in operation forever, and reasonable opportunity having been afforded to the plaintiffs in error to obtain compensation for the damages sustained by the construction of the improvement, we think they must be deemed to have waived their right to them."

An owner who has been afforded an opportunity of having compensation and damages assessed for property taken or injured and has failed to avail himself of that opportunity cannot enjoin the improvement on the ground that compensation has not been paid or tendered to him. See *Wabash R. Co.* v. *Defiance*, 167 U.S. 88 (1897). Although the appellant in her complaint sought to enjoin the appellee from diverting the waters of the Neversink River (R. 12) she has apparently abandoned that position and now seeks instead an opportunity to be heard as to the extent of damage and compensation (appellant's brief, pp. 6, 12, 41).

Not having presented her claim in the Neversink Riparian Section No. 4 proceeding within the time prescribed by statute the present appellant is now barred from asserting a claim in the proceeding, maintaining an action for damages or for possession of the property, or maintaining the present suit for an injunction.

CONCLUSION

The order and judgment appealed from should be affirmed, with costs.

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Respectfully submitted,

LEO A. LARKIN
Corporation Counsel
of the City of New York
Attorney for Appellee
41 John Street
Kingston, N. Y.

SEYMOUR B. QUEL
THEODORE R. LEE
WILLIAM A. KAERCHER
of Counsel